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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

MITSUI SUMITOMO INSURANCE CO., LTD.

Plaintiffs

v.

EVERGREEN MARINE CORPORATION and UNION
PACIFIC RAILROAD COMPANY

Defendants.

ECF Case

07 CV 3874
(Judge McMahon)

**EVERGREEN'S DECLARATION OF PATRICK CHEN IN SUPPORT OF
DEFENDANTS' REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANTS'
CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT**

PATRICK CHEN, declares that the following statement is true under the penalty of perjury:

1. I am the Junior Vice President of Evergreen Shipping Agency (America) Corporation, the U.S. agent for defendant EVERGREEN MARINE CORPORATION ("EVERGREEN") – a position I have held since 2001. I am fully familiar with the facts and circumstances of this matter and except as otherwise indicated herein, I make this reply declaration on personal knowledge in support of defendants' cross motion for partial summary judgment. My duties include being familiar with all of the property holdings and general

operations of EVERGREEN in the United States ports wherein EVERGREEN conducts business; and being knowledgeable about any regulatory activities of agencies of the United States as they pertain to EVERGREEN's operations within the United States.

2. I am advised by counsel that plaintiff makes the argument that EVERGREEN fits the statutory definition of a rail carrier.

(a) EVERGREEN is an ocean common carrier in the foreign commerce of the U.S. and is licensed and regulated by the Federal Maritime Commission, not the Surface Transportation Board. The Federal Maritime Commission maintains a regular web site at www.fmc.gov in which it publishes the identities of all licensed vessel operating common carriers. EVERGREEN is on that list. *Id.*

(b) EVERGREEN is also what is called a "container carrier" in that it only transports cargo that is packed and sealed into 20 or 40 foot cargo shipping containers which can be used to transport goods between various modes of transport (ship, railcar, truck and plane) without the need of unstowing and restowing the container contents. The carriage of goods by two or more modes of transport is known in the industry as intermodal or multi-modal carriage.

(c) As with most ocean common carriers today, EVERGREEN offers "intermodal" or "multimodal" service to its customers. In other words, unlike ocean carriers of decades ago, EVERGREEN's service is not limited to port-to-port sea carriage. It also offers pick-up and delivery of containerized cargoes at inland points many miles removed from the seaport. To render this service, EVERGREEN engages rail and motor carriers to whom it subcontracts the land carriage portions of its moves. The inland carriage that EVERGREEN offers is incidental to its business as an ocean common carrier.

(d) EVERGREEN does not own or operate any railcars, rail equipment, or rail transportation system. The railcars, equipment and systems are owned and operated by the rail carriers to whom it subcontracts the land carriage. EVERGREEN does lease port terminals from municipal authorities with rail facilities where containerized cargoes can be moved by truck and straddle carrier between EVERGREEN ships and its subcontractor/rail carrier's railcars as part of their intermodal or multi-modal carriage. However, this facility not open to or used by EVERGREEN's customers. Evergreen does not allow its customers to use that facility. It uses it itself in connection with its sea carriage operations. EVERGREEN does not make those facilities available to the public for the public's use for compensation or otherwise. The facilities are used entirely by EVERGREEN for its internal operations.

(e) EVERGREEN does not hold itself out to the public as a rail carrier or as one who will procure rail carriage for its shippers. EVERGREEN simply holds itself out as offering intermodal or multimodal service as part of its carriage of goods by sea. EVERGREEN accepts responsibility for the cargo for the entire intermodal or multimodal move for which it has contracted and makes its own arrangements with the land carriers.

(f) EVERGREEN's operations as an intermodal or multimodal carrier have been as open and obvious as they have been widespread for decades. At no time to my knowledge has the Surface Transportation Board attempted to exercise jurisdiction over EVERGREEN or any other ocean common carrier as defined by the Shipping Act of 1984 [as amended by the Ocean Shipping Reform Act of 1998 (46 C.F.R. 520.2)], nor has it done anything to suggest that EVERGREEN or any other ocean common carrier qualifies as a rail carrier subject to its jurisdiction.

Dated: April 3, 2008

By:


PATRICK CHEN